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court says that an injunction will not be issued as a threat, because the defendant will still be under obligations not to divulge, even when the contract of employment with the plaintiff has been completed.

EVIDENCE—IMPEACHMENT OF DYING DECLARATION.—Plaintiff in error was convicted of murder in the first degree. Upon the trial the dying declaration of the deceased was introduced by the prosecution without objection. Certain statements made by the deceased prior to, and inconsistent with, his dying declaration were then offered on the part of the defendant. These statements were objected to by the district attorney upon the ground that they were hearsay, and that the proper foundation for their introduction had not been laid. The objection was sustained and the testimony was excluded. *Held,* it was competent for the defendant to introduce evidence tending to show that the deceased had made statements out of court, after he had received his mortal wound, inconsistent with his dying declaration, and the exclusion of such statements was reversible error. *Salas* v. *People,* (Colo. 1911), 118 Pac. 992.

The rule adopted by the court that a dying declaration may be impeached by showing that the person making it has made other statements inconsistent therewith, is held by many courts. *Carver* v. *U. S.,* 164 U. S. 694, *Gregory* v. *State,* 140 Ala. 16, *State* v. *Lodge,* 9 Houst. 542, *Allen* v. *Com.,* 134 Ky. 110, *State* v. *Charles,* 111 La. 933. But GARRIGUES, J., who dissented in the principal case, presents a very able argument in favor of the contrary doctrine. The law is thoroughly established that evidence cannot be introduced showing that a witness at some other time, when not under oath, made statements inconsistent with testimony, without first laying the foundation therefor by interrogating the witness himself as to whether he ever made such inconsistent statements or not. *Janes* v. *People,* 44 Colo. 535. The death of the witness does not dispense with the general rule in such cases requiring a foundation to be properly laid. *Mattox* v. *U. S.,* 156 U. S., 237, *Stacy* v. *Graham,* 14 N. Y. 492, *Runyan* v. *Price,* 15 Ohio St. 1. "It necessarily follows," concludes the judge, "if there is no such exception, that such statements, not made under oath, or *in extremis,* are purely hearsay, and not admissible to impeach a dying declaration. * * An exception to a general rule should never be created where it would simply shift the hardship from one party to another. If established, an impeaching witness could with impunity swear to any statement whatever, without fear of contradiction. Those with long practical experience in criminal trials know that to recognize such an exception will invite fraud, corruption, perjury, and subornation of perjury in our courts." The hearsay rule rejects assertions offered testimonially which have not been in some way subjected to the tests of cross examination and oath. *Fabrigas* v. *Mostyn,* 20 How. S. Tr. 135, *Marshall* v. *Chi. etc. R. Co.* 48 Ill 475. The dying declaration is an exception to this rule. *Wright* v. *Littler,* 3 Burr. 1244, *Campbell* v. *State,* 11 Ga. 353. If, therefore, the dying declaration is admitted but the inconsistent statements are rejected, since by hypothesis the statements in the dying declaration have not been subject to cross-examination, the law, if it insisted on requiring the preliminary question, would deprive the

impeacher of two of his most important weapons of defense—cross examination and prior self-contradiction. WIGMORE EVIDENCE, § 1033. Such prior inconsistent statements are therefore admitted on the ground of necessity and fairness. *State* v. *Lodge,* 9 Houst. 542. There are a number of cases, however, which hold with the dissenting judge that such oral hearsay statements, made out of court, not made under oath, and not *in extremis,* should not be admitted for the purpose of impeaching a dying declaration. *Maine* v. *People,* 9 Hun 113, *Wroe* v. *State,* 20 Ohio St. 460, *State* v. *Hendricks,* 172 Mo. 654, *State* v. *Mills,* 79 S. C. 187, and *Hamilton* v. *Smith,* 74 Conn. 374.

EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES AGAINST HIM—ADMISSIBILITY OF TESTIMONY OF WITNESS NOW OUT OF STATE GIVEN ON FORMER TRIAL. Defendant was convicted of murder and upon appeal a new trial was granted. By the time of this second trial one of the witnesses for the prosecution on the former trial had removed from the State and could not be effectively served with a subpoena. Thereupon the official reporter was allowed to read the testimony of the witness as given at the former trial, from his shorthand notes then taken and properly preserved. Defendant contends that the right of the accused in all criminal prosecutions and cases involving life or liberty to be confronted with the witnesses against him was thereby violated. *Held,* (WEAVER, J. dissenting) the admission of such testimony violated no rights of the accused. *State* v. *Brown,* (Iowa 1911) 132 N. W. 862.

It has been held that Article 6 of the Amendments to the Constitution of the United States does not apply in prosecutions in State courts. *West* v. *Louisiana,* 194 U. S. 258, 24 Sup. Ct. 650. But the constitutions in most of the States contain a similar provision. Where a witness dies before the second trial, it has generally been conceded that the former testimony of the witness is admissible, and no right of the accused is violated by its admission. *U. S.* v. *Greene,* 146 Fed. 796, *Kendrick* v. *State,* 10 Humph. 479, *Com.* v. *Richards,* 18 Pick. 434, *State* v. *Kimes,* (Iowa), 132 N. W. 180. Some courts base this upon a construction given to the constitution as a matter of compelling necessity to avoid a failure of justice. *Marler* v *State,* 67 Ala. 55; or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice is allowed, *State* v. *McO'Blenis,* 24 Mo. 402. Others hold that by being confronted with the witness who undertakes to state the testimony of the deceased, the constitutional requirement is met, leaving only the competency of the evidence to be determined. *Summons* v. *State,* 5 Ohio St. 325. But the real basis for the admission of such testimony is to prevent a miscarriage of justice, and its admission is in reality an exception to, rather than a compliance with, the rule that the accused is entitled to be confronted with the witnesses against him. *Mattox* v. *U. S.,* 146 U. S. 140. In a few jurisdictions such former testimony is not admitted, even in the case of the death of a witness. *State* v. *Potter,* 6 Idaho 584, overruling *Territory* v. *Evans,* 2 Idaho 627, *Kaelin* v. *Com.,* 84 Ky. 354. In Texas it was first held in the case of *Greenwood* v. *State,* 35 Tex. 587 that such testimony was admissible, then in the exhaustively considered opinion of *Cline* v.